SUPREME COURT, U. S.
JAN 28 1975

IN THE

Supreme Court of the United States

———— TERM, 1975

No. 74-933

SECOND NATIONAL BANK OF NORTH MIAMI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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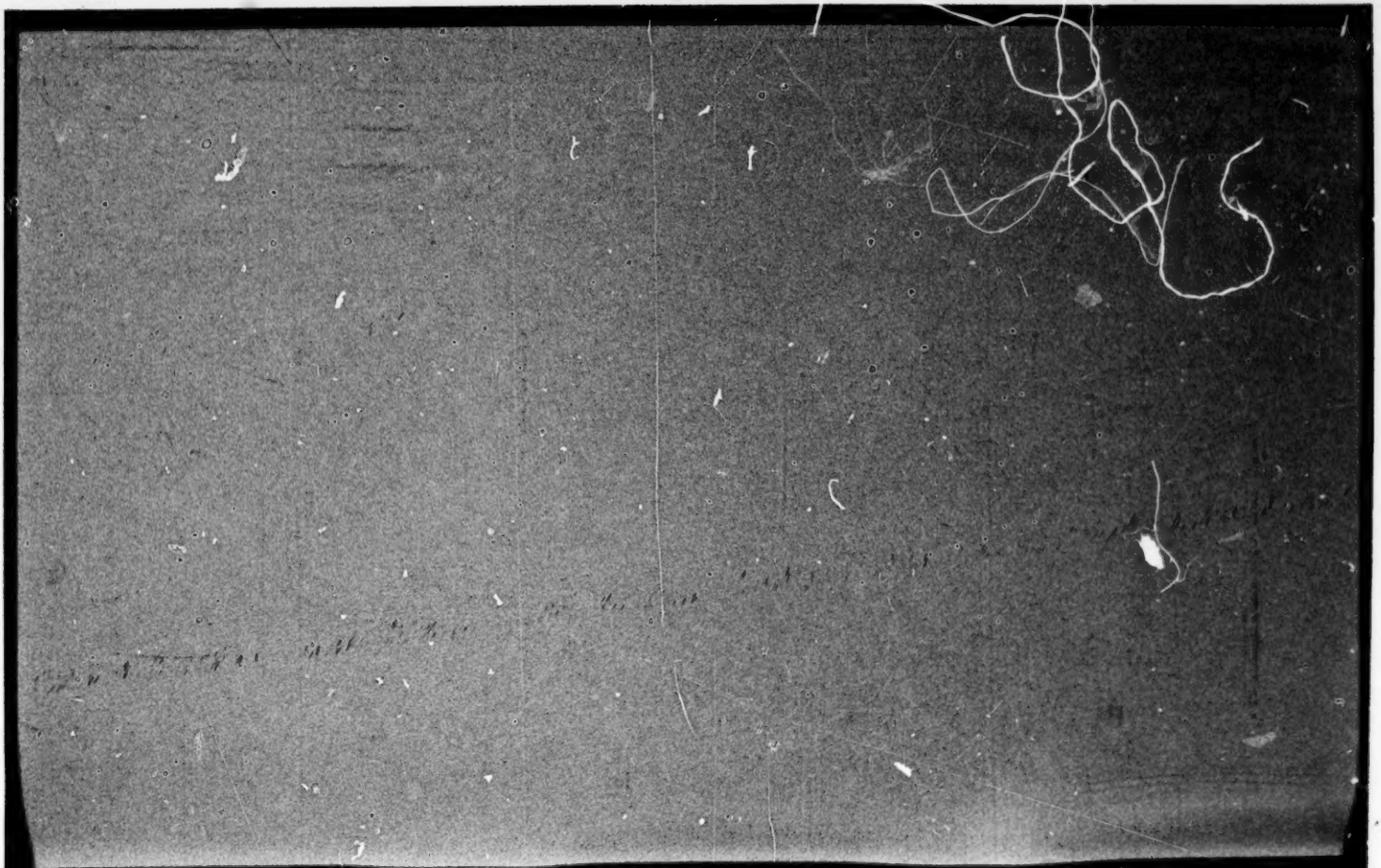

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ABBREVIATIONS USED IN PETITION:

App.—Appendix to this Petition for Writ of Certiorari

C.A. App.—Appendix filed with the Court of Appeals for the Fifth Circuit in connection with Appeal in this cause

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SECOND NATIONAL BANK OF NORTH MIAMI,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, THE SECOND NATIONAL BANK OF NORTH MIAMI, by and through its undersigned attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered October 4, 1974; petition for rehearing denied on October 31, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 502 F.2d 535 (1974).

While no formal opinion was rendered by the United States District Court for the Southern District of Florida and is therefore not reported, that portion of the tran-

script of trial comprising the findings of fact and conclusions of law of the United States District Court for the Southern District of Florida commences at page 207 of the Appendix filed with the United States Court of Appeals for the Fifth Circuit in connection with Petitioners' appeal to that court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 4, 1974; petition for re-hearing denied on October 31, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. DID THE COURT BELOW ERR IN HOLDING THAT PETITIONER WAS NOT DENIED DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN THE APPLICATION OF SECTION 6311 (b) (2) OF THE 1954 INTERNAL REVENUE CODE UNDER THE FACTS OF THIS CASE, WHERE THE BANK MONEY ORDERS UPON WHICH SUIT WAS BROUGHT BY THE UNITED STATES WERE PROCURED BY AGENTS OF THE INTERNAL REVENUE SERVICE THROUGH PARTICIPATION IN A FRAUD UPON PETITIONER.

II. DID THE COURT BELOW ERR IN TREATING AS ESSENTIALLY FACTUAL, AND THEREFORE CONCLUSIVE UNLESS CLEARLY ERRONEOUS, THE DISTRICT COURT'S DETERMINATION THAT THE UNITED STATES WAS A HOLDER IN DUE COURSE OF THE BANK MONEY ORDERS, WHERE: (a) THE PRE-TRIAL STIPULATION PROVIDED THAT THE HOLDER IN DUE COURSE ISSUE WAS A MIXED QUESTION OF FACT AND LAW; (b)

THE CONDUCT OF THE INTERNAL REVENUE SERVICE AGENTS IN PROCURING THE BANK MONEY ORDERS DISTURBED THE TRIAL JUDGE; (c) THE COURT OF APPEALS ACKNOWLEDGED THAT CERTAIN EVIDENCE SUPPORTS PETITIONER'S DEFENSIVE THEORIES; AND (d) DETERMINATION THAT THE UNITED STATES IS A HOLDER IN DUE COURSE OF BANK MONEY ORDERS IS A SUMMARY CHARACTERIZATION OF COMPLICATED FACTUAL AND LEGAL MATTERS AND NOT THE KIND OF "FACT" TO WHICH CONCLUSIVENESS SHOULD ATTACH IN AN APPELLATE COURT.

III. DID THE COURT BELOW ERR IN FAILING TO APPLY THE EQUITABLE "CLEAN HANDS" DOCTRINE TO THE UNITED STATES, WHERE THE UNITED STATES SOUGHT EQUITABLE RELIEF IN THE FORECLOSURE OF A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK FOR FAILURE TO PAY UPON MONEY ORDERS OBTAINED FROM PETITIONER BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY INTERNAL REVENUE SERVICE AGENTS.

IV. DID THE COURT BELOW ERR IN GIVING TOO BROAD AN INTERPRETATION OF SECTION 6311 OF THE 1954 INTERNAL REVENUE CODE, SO AS TO PROVIDE FOR A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK WHERE (a) PETITIONER BANK NEVER ACTUALLY RECEIVED THE FUNDS FOR WHICH THE MONEY ORDERS WERE ISSUED, (b) THE MONEY ORDERS WERE OBTAINED FROM PETITIONER BANK BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY AGENTS OF THE INTERNAL REVENUE SERVICE, AND (c) THE MONEY ORDERS WERE NOT DRAWN IN PAYMENT OF INTERNAL

REVENUE TAXES, BUT INSTEAD WERE COMPLETED BY THE INTERNAL REVENUE SERVICE OTHERWISE THAN AS AUTHORIZED UNDER FLORIDA UNIFORM COMMERCIAL CODE SECTION 673.3-407.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution (App. 1a) Section 6311(b)(2) of the 1954 Internal Revenue Code (App. 2a) Section 673.3-302 Florida Statutes (App. 3a) Section 673.3-407 Florida Statutes (App. 4a).

STATEMENT OF THE CASE

Respondent, THE UNITED STATES OF AMERICA, filed suit in the United States District Court, Southern District of Florida, on January 5, 1972, seeking to foreclose a claimed lien on the general assets of the petitioner bank, predicated on the petitioner's issuance of One Hundred Ninety (190) money orders in the amount of Ninety-two Thousand Three Hundred Fifty-five Dollars and 86/100 ($92,355.86) received in part payment of the Internal Revenue taxes of a person other than petitioner, and which money orders were not paid upon presentation to the petitioner.

The basis for federal jurisdiction in the United States District Court was pursuant to 28 U.S.C. Sections 1340 and 1345; 62 Stat. 982; 28 U.S.C. Sections 1346(b) and Sections 2671 et. seq., and Sections 7401 and 7402 of the Internal Revenue Code of 1954.

For the Court's reference, there follows a listing of the persons involved and the fact circumstances giving rise to this law suit:

The Hannan Company—the general contractor in the construction of the Midway Mall Shopping Center, Dade

County, Florida. The Hannan Company will hereinafter be referred to as "HANNAN."

Medallion Electric Co., Inc.—the electrical sub-contractor working under a contract with HANNAN to furnish the electrical work in the construction of the Midway Mall Shopping Center. Medallion Electric Co., Inc. is hereinafter referred to as "MEDALLION" and its then Secretary-Treasurer and principal stockholder, Leonard Gutkin, will be referred to as "GUTKIN."

The Second National Bank of North Miami—hereinafter referred to as "BANK" or "petitioner," was the BANK at which MEDALLION maintained regular and payroll accounts. It was against a check deposited to the payroll account of MEDALLION in the BANK (but which check was never collected by the BANK) that the BANK issued the 190 personal money orders in question, and it is the delinquent tax indebtedness of MEDALLION (not the BANK) which the respondent seeks to satisfy through these proceedings.

Internal Revenue Service—hereinafter referred to as "IRS." The employees of IRS most immediately involved in the collection of MEDALLION's tax indebtedness and in the fact circumstances underlying this lawsuit are Mr. J. E. Hancock and Mr. Roger Cabal, hereinafter referred to respectively as "HANCOCK" and "CABAL."

The following facts were in effect, stipulated to by counsel for respondent and petitioner in their pretrial stipulation (C.A. App. 69-79), and at the time of trial (C.A. App. 106, 108-109, 131, 166).

MEDALLION, the electrical sub-contractor working under a contract with HANNAN, the general contractor, in the construction of the Midway Mall Shopping Center, had existing tax obligations to the United States. In this connection, MEDALLION, through its President, GUT-

KIN, and others, together with MEDALLION's attorney, Alphonse M. Schwitalla, Esquire, had held conferences with the Collection Division of IRS in Dade County, Florida, and in particular with HANCOCK and CABAL (C.A. App. 127-128, 148, 70). The BANK was unaware of the existing tax obligations of MEDALLION, though HANNAN may have been aware of them.

Prior to the issuance by the BANK of the 190 personal money orders in litigation on October 14, 1970, the BANK had at the request of HANNAN and MEDALLION previously issued money orders in the same form and manner and delivered them to MEDALLION on or about October 5, 1970 (C.A. App. 70). Such money orders issued the week earlier are not in dispute. Both with regard to the issuance of personal money orders on October 5, and October 14, 1970, the BANK prepared such personal money orders against the deposit of checks in the equivalent amount to the payroll account of MEDALLION maintained at the BANK. In the week of October 14, 1970, the sum of approximately $9,434.61 was also deposited to MEDALLION's payroll account by wire transfer. Each of the weeks referred to, the money orders, being 190 in number, were prepared from a schedule furnished by MEDALLION to the BANK and which schedule was a photostatic copy from the payroll ledger of MEDALLION (C.A. App. 126-127, 147, 447-450). The schedule provided the weekly wages of each electrician in MEDALLION's employ, but did not furnish the name of the electrician. For this reason, and because it is customary for personal money orders to be issued in such manner, the personal money orders bore the amount of each electrician's wages, but did not bear the name of any payee. The money orders were, however, issued for the specific purpose of paying MEDALLION's electricians on the Midway Mall job (C.A. App. 116, 71), and, with reference to the issuance of money orders on or about October 14th, HANNAN issued its check

made payable to Medallion Electric Co., Inc. and The Second National Bank of North Miami (C.A. App. 456-458), and HANNAN further had its representative on the BANK's premises together with GUTKIN, to insure that the check issued by HANNAN was deposited only to the *payroll* account of MEDALLION (C.A. App. 117). Thereafter, the money orders were drawn with the understanding and purpose that the 190 personal money orders were to be issued to MEDALLION's electricians on or about October 14th, as they had been the prior week when drawn in the same manner (C.A. App. 140-151, 71).

On October 13, 1970, MEDALLION, through GUTKIN and others, and through its attorneys, disclosed to IRS that MEDALLION had previously received the issuance of personal money orders from the BANK for the purpose of paying electricians on the Midway Mall job, but issued without a named payee, although bearing the amount on each money order of the electrician's wages and that MEDALLION anticipated a further such issuance of money orders for the same purpose and to be issued in the same manner (C.A. App. 106, 149-151, 70, 464). It should be noted that the BANK is not nor has it ever been delinquent in taxes to the United States, and the basis for the respondent's claim is not an existing tax liability of the BANK, but is predicated only upon delinquent tax liabilities of MEDALLION (C.A. App. 72).

Following the issuance of the first set of 190 personal money orders on or about October 5, 1970, which personal orders are not in contention in this lawsuit, HANNAN issued its corporate check made payable to both the BANK and MEDALLION, with the object of having MEDALLION's electricians on the Midway Mall job paid out of the proceeds of the deposit (C.A. App. 116, 70-71, 457-458). The BANK deposited to MEDALLION's pay-

roll account the mentioned HANNAN check and thereupon issued the 190 personal money orders bearing the amounts of wages owed to each electrician for payroll, but without a named payee, and delivered such 190 personal money orders to MEDALLION (C.A. App. 70-71). The purpose of the issuance of the money orders was for the payment of electricians on the Midway Mall job. The personal money orders were prepared from a listing furnished to the BANK by MEDALLION reflecting only amounts but not the names of the individual electricians (C.A. App. 126-127, 133-134, 451-454). Consequently, the purpose of the HANNAN deposit and the issuance of the 190 personal money orders was solely and specifically to be used in payment of the electricians employed by MEDALLION on the Midway Mall job (C.A. App. 132-133, 70-71).

Notwithstanding the purpose of the HANNAN deposit and the issuance of the personal money orders, MEDALLION delivered the personal money orders to IRS (C.A. App. 133-134, 139, 154, 160, 177), and IRS, after itself inserting in the place for payee the name of the Internal Revenue Service, commenced processing the personal money orders for deposit and application to the tax liability of MEDALLION (C.A. App. 71).

The BANK had issued its personal money orders upon telephone *verification* that HANNAN had funds sufficient in The City National Bank to cover the check deposited to the MEDALLION payroll account, but had issued the personal money orders prior to the actual *collection* of such funds (C.A. App. 71). When HANNAN learned of the unintended use to which the personal money orders had been put (by MEDALLION's seeking to use the money orders not to pay its electricians but to reduce MEDALLION's own tax liabilities), HANNAN stopped payment on the check it had drawn to the BANK and MEDALLION and which had been deposited to the

MEDALLION payroll account (C.A. App. 71). When the BANK received notice of this, and not having collected funds to cover the issuance of the personal money orders, the BANK also in turn stopped payment upon the personal money orders and immediately gave notice to the Collection Division of IRS in Dade County, Florida, and in Chamblee, Georgia, by telephone and telegram that it had so stopped payment. At the time of such notification, the personal money orders had not, on the information and belief of the BANK, been deposited by IRS (C.A. App. 71-72).

The IRS, through agents HANCOCK and CABAL, was aware that such personal money orders had been issued in the prior week by the BANK in the amounts of the individual electricians' wages, but with payee blank (C.A. App. 70). IRS was further aware that the issuance of the money orders intended for on or about October 14, 1970, was also for the weekly payroll of electricians by MEDALLION (C.A. App. 106, 149-151, 154-155, 70, 464). Neither MEDALLION nor IRS, however, apprised the BANK that such money orders, issued with the understanding of HANNAN and the BANK that the same would be used for the payment of the electricians' weekly payroll, would, instead, be submitted by MEDALLION to IRS with the object of reducing MEDALLION's outstanding tax liabilities (C.A. App. 134, 72).

While the above facts were, in effect, stipulated to in the pretrial stipulation and during the course of the trial proceedings, the main factual issue for determination at trial was *not* stipulated to. That is, whether respondent, through its agents in the Internal Revenue Service, did induce, instruct or require MEDALLION to obtain the 190 personal money orders from the BANK and turn them over to the IRS, knowing that the 190 personal money orders were to be issued for payroll, and this was accomplished with the respondent's cooperation and assistance.

With regard to this remaining and unstipulated to factual question, the record reflects that at a meeting with the IRS on October 13, 1970, prior to the issuance of the 190 personal money orders by the BANK, MEDALLION was induced, instructed and required by HANCOCK and CABAL, acting on behalf of the IRS, to obtain and deliver to the IRS the 190 personal money orders which are the subject of this suit, and that it was upon such inducement, instruction and requirement that MEDALLION obtained the money orders from the BANK and delivered them to the IRS (C.A. App. 133-134, 139, 154, 160, 177).

The trial commenced and concluded on February 7, 1973, before the United States District Court for the Southern District of Florida sitting without a jury with the trial court making findings of fact and conclusions of law at the end of the trial (C.A. App. 207-221) and thereafter on February 16, 1973, entering supplemental findings and conclusions of law (C.A. App. 80-82).

The trial court entered judgment on February 27, 1973, granting to the respondent a lien upon all of the assets of the petitioner, and ordering payment of the amount of $92,355.86, together with interest and costs to the respondent within ten (10) days or the appointment of a receiver and subsequent sale of the petitioner's assets to satisfy the lien. The judgment of February 27, 1973 also denied the petitioner's counter-claim (C.A. App. 83-84).

The Petitioner appealed the judgment of the United States District Court to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court on October 4, 1974, and denied re-hearing on October 31, 1974.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because (1) it erroneously holds that the petitioner was not denied due process of law as guaranteed by the Fifth Amendment of the Constitution through the application of Section 6311(b)(2) of the 1954 Internal Revenue Code under the facts of this case (2) it erroneously treated as essentially factual, and therefore conclusive unless clearly erroneous, the District Court's determination of holder in due course status for the United States (3) it erroneously fails to apply the equitable "clean hands" doctrine to the United States, and (4) it provides for too broad an interpretation of Section 6311 of the 1954 Internal Revenue Code. These errors, it is respectfully submitted, relate to questions of federal law decided in a way in conflict with applicable decisions of this Court, with the decisions of another Court of Appeals on the same matter and have so far departed from the accepted and usual course of judicial proceedings or have so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision. These errors will be discussed separately in the above stated order.

I

THE COURT ERRED IN HOLDING THAT PETITIONER WAS NOT DENIED DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THE APPLICATION OF SECTION 6311 (b)(2) OF THE 1954 INTERNAL REVENUE CODE UNDER THE FACTS OF THIS CASE WHERE THE BANK MONEY ORDERS UPON WHICH SUIT WAS BROUGHT BY THE UNITED STATES WERE PROCURED BY AGENTS OF THE INTERNAL REVENUE SERVICE THROUGH PARTICIPATION IN A FRAUD UPON PETITIONER.

The application of a statute may be unconstitutional for two reasons, first because the statute as drawn violates the constitution, and, second, because the statute, though constitutionally drawn, may be unconstitutionally applied. While the BANK did not seek in its appeal to the United States District Court for the First Circuit to question the constitutionality of Section 6311 of the Internal Revenue Code of 1954 as applied to an appropriate situation, it was urged that application of Section 6311 to the BANK, under the circumstances of this case, would be an unconstitutional application of Section 6311, resulting in a taking of the BANK's property without due process of law in violation of the Fifth Amendment to the United States Constitution.

In effect, the respondent has sought to use Section 6311 not as a device to maintain the preferential position of the United States as against general creditors under circumstances where the BANK had actually obtained and retained fund against which the remittance was made and drawn in payment of Internal Revenue taxes, but rather as a trap which the IRS, acting in concert with MEDALLION, had helped to bait, and having taken in the BANK, IRS has sought to extract from the BANK monies which the BANK itself had never received.

The Court of Appeals saw nothing unusual or impermissible in the use of Section 6311 to create a lien upon the BANK's assets in the event the money orders were not duly honored, the Court considering this to be "no more than a decision to trace the taxpayer's assets."

However, in the case before the Court it is clear that the BANK at no time came into possession of the assets of the taxpayer (MEDALLION) since the BANK never received the funds from the deposit of HANNAN'S check, against which the money orders were issued. And, those very money orders which were issued by the BANK solely and specifically to be used in payment of the electricians employed by MEDALLION, were obtained from the BANK by concealment and misrepresentation practiced upon the BANK on the inducement and instruction of the IRS.

Petitioner suggests that in as much as the fraudulent inducement which caused it to issue the money orders was made at the instruction and direction of the IRS, respondent should not now be allowed to benefit by the application of Section 6311 which would result in a taking not of the property of the taxpayer but of the petitioner BANK.

II

THE COURT ERRED IN TREATING AS ESSENTIALLY FACTUAL, AND THEREFORE CONCLUSIVE UNLESS CLEARLY ERRONEOUS, THE DISTRICT COURT'S DETERMINATION THAT THE UNITED STATES WAS A HOLDER IN DUE COURSE OF THE BANK MONEY ORDERS, WHERE: (a) THE PRE-TRIAL STIPULATION PROVIDES THAT THE HOLDER IN DUE COURSE ISSUE WAS A MIXED QUESTION OF FACT AND LAW; (b) THE CONDUCT OF THE INTERNAL REVENUE SERVICE AGENTS IN PROCURING THE BANK MONEY ORDERS DISTURBED THE TRIAL JUDGE; (c) THE COURT OF APPEALS ACKNOWLEDGED THAT CERTAIN EVIDENCE SUPPORTS PETITIONER'S DEFENSIVE THEORIES, AND (d) DETERMINATION THAT THE UNITED STATES IS A HOLDER IN DUE COURSE OF BANK MONEY ORDERS IS A SUMMARY CHARACTERIZATION OF COMPLICATED FACTUAL AND LEGAL MATTERS AND NOT THE KIND OF "FACT" TO WHICH CONCLUSIVENESS SHOULD ATTACH IN AN APPELLATE COURT.

Despite the fact that the pre-trial stipulation between the Petitioner and respondent provided that the question of whether the respondent was a holder in due course of the 190 personal money orders issued by Petitioner was a mixed question of fact and law, and despite the fact that the trial judge himself was disturbed by the actions of the Internal Revenue Service agents, as noted by the Court below, and that the Court of Appeals itself conceded that certain evidence supports the Petitioner's defensive theories, yet the District Court of Appeals treated the "holder in due course" determination as essentially factual and nonreversible unless clearly erroneous.

In the case of *Baumgartner* vs. *United States of America*, 322 U.S. 665, 670, this Court noted that while the concurrent findings of two lower courts are persuasive

proof in support of their judgments, that the phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment, and that such a "finding of fact" may be the ultimate judgment on a mass of details and the conclusion that may appropriately be drawn from the whole mass of evidence is not always the acertainment of the kind of "fact" that precludes consideration by the Supreme Court.

In order for the IRS to be holder in due course of the 190 personal money orders, it must under Section 673.3-302 Florida Statutes have taken the 190 personal money orders in good faith and without notice of any defense against or claim to it on the part of any person.

The trial court never addressed itself specifically to the questions of good faith and notice of defenses which go to the very requirements of being a holder in due course.

The reason for the distress of the trial judge over the morality of the actions taken by the Internal Revenue agents is understandable in the light of the testimony of MEDALLION's secretary-treasurer and principal stockholder, Leonard Gutkin, and MEDALLION'S attorney, Alphonse M. Schwitalla:

(From the testimony of LEONARD GUTKIN at C.A. App. 133-134, 139)

> "QUESTION: Did you, at that time, after so advising the representatives of the Internal Revenue Service, receive any instructions or orders or directions regarding these money orders?
>
> ANSWER: Yes.
>
> QUESTION: From whom did you receive them and what was said to you, sir?
>
> ANSWER: From whom exactly, I don't know. I think it's in the deposition.

QUESTION: Is it one of those gentlemen outside here?

ANSWER: I believe so, yes. We were instructed to turn over all monies, accounts receivables, and anything we received, to the Internal Revenue.

* * * *

QUESTION: When you received the money orders —when MEDALLION received the money orders, did you, at that time, intend to turn them over to the Internal Revenue Service?

ANSWER: Yes; that is what we were instructed to do.

* * * *

THE COURT: . . . We want to know whether you interpreted what they said to you as an order or a suggestion or whatever, to bring the money orders down there.

THE WITNESS: I considered it an order, more or less. If they said, 'Bring the money orders down,' I brought them down there."

(From the testimony of ALPHONSE SCHWITALLA —attorney for MEDALLION at C.A. App. 154-155)

"QUESTION: Having read that, Mr. Schwitalla, I would like to know whether Mr. Hancock, on behalf of the IRS, instructed you to the effect that the minute you got those money orders to bring them down; to go pick them up and bring them down to the IRS.

ANSWER: I can only repeat again what I said. We told them what the situation was and he said to go pick them up and bring them down there. That's right.

Just what I said on those depositions is true. Mr. Hancock is the one we spoke to, along with Mr. Cable; but Mr. Hancock, as I said there, was the superior present and he said, 'Go get them, then. If

that is the case, go get them and bring them down here.'

So we went and got them and brought them down.

QUESTION: This was after you had told the IRS the procedure and Hannan's purpose for which those money orders were to be issued; is that correct?

ANSWER: We explained to them the procedure that had been followed the previous week and the procedure we expected that was going to be followed that week.

Naturally, that procedure disclosed, as you say, Hannan's purpose for which the deposit was going to be made.

QUESTION: That procedure included furnishing to the bank a listing of 190 individual electricians or employees wages; is that correct?

ANSWER: That procedure included Medallion furnishing to the bank a list of some 183 or 190 individual amounts which were to be the net pay to Medallion employees for the week."

The testimony cited above clearly reveals the knowledge of the IRS as to the manner in which the money orders were to be issued, the payroll purposes for which they were to be issued and the IRS order to ". . . go get them and bring them down here."

These facts in evidence should have precluded a determination of good faith and lack of notice on the part of the respondent in obtaining the money orders, and the failure of the trial court to address itself to these essentials in the make-up of a holder in due course should not have been followed by the assumption of the Court of Appeals that the District Court *implicitly* decided the question of good faith and notice, especially where the trial judge acknowledged that he did not find it a very pleasing thing that the government did (C.A. App. 209).

Because the Court of Appeals failed to do so, this Supreme Court is now respectfully requested to examine

the foundations for the District Court's summary characterization that the respondent is a holder in due course of the money orders issued by Petitioner.

III

THE COURT BELOW ERRED IN FAILING TO APPLY THE EQUITABLE "CLEAN HANDS" DOCTRINE TO THE UNITED STATES, WHERE THE UNITED STATES SOUGHT EQUITABLE RELIEF IN THE FORECLOSURE OF A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK FOR FAILURE TO PAY UPON MONEY ORDERS OBTAINED FROM PETITIONER BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY INTERNAL REVENUE SERVICE AGENTS.

The general purposes of equity have been applied to the United States in a suit by it for equitable relief. *Pan-American Petroleum & Transport Co. vs. United States*, 273 U.S. 456, 506 (1926) and it has likewise been stated that the government may not invoke the aid of a court of equity if for any reason its conduct is such that it must be said to have come into court with unclean hands. *Deseret Apartments, Inc.* vs. *United States*, 250 F.2d 457 (10th Cir., 1957).

While the Court of Appeals for the Fifth Circuit, in a case involving the United States, has recognized the general rule that he who seeks equity must do equity, *Ehrlich* vs. *United States*, 252 F.2d 772 (5th Cir., 1958), it has, in the instant case, merely indicated that it is unwilling to quarrel with the trial judge's belief that conduct "insufficiently malignant" to deprive a party of holder of due course status is likewise an inadequate reason for refusing to grant an equitable remedy.

The BANK occupies its position in these proceedings because of the participation of the IRS and MEDALLION in a course of conduct which could only have been calculated to deceive the BANK. If such deceit had not been

intended, one bank money order for the total amount could have been requested, and there would have been no need for MEDALLION to furnish a listing of the wages of 190 electricians and to request of the BANK 190 separate money orders. It is manifest from the evidence that the respondent, through its agents, was aware of the purpose for which HANNAN had deposited it check to the payroll account of MEDALLION and the purpose for which the 190 money orders were to be issued by Petitioner on October 14, 1970, as they had been issued in the prior week.

Notwithstanding such knowledge, and before the issuance of such money orders, IRS called upon MEDALLION to procure, and abetted MEDALLION in the procurement of, the 190 money orders under false pretenses with the design that they be turned over by MEDALLION to IRS so that MEDALLION's taxes might be reduced. Had MEDALLION not, on the order of IRS diverted the money orders, they would not have come into the hands of IRS. Or, had MEDALLION or the IRS disclosed to the BANK the true purpose for which the money orders were sought, the BANK would not have issued such money orders. In either case the money orders would not have come into the hands of IRS through MEDALLION and no claim could be maintained by the respondent against the BANK

Under the governing state case law a plaintiff seeking equitable relief must be free of any inequitable conduct relative to the controversy, *Gables Racing Association, Inc.* vs. *Persky*, 6 So.2d 257, *Deal* vs. *Migoski*, 122 So.2d 415, and equity will not permit a person to profit from such persons owned guile, wrong and inequity. *Sahler* vs. *Sahler*, 17 So.2d 105; *Schmitt* vs. *Bethea*, 82 So. 817. Overreaching, concealment or other unconscientious conduct are sufficient to bar relief, *Dale* vs. *Jennings*, 107 So. 175.

The "clean hands" doctrine is the counterpart in equity of the defense of entrapment in criminal law, *Peters* vs. *Brown*, 55 So.2d 334; *Leesburg* vs. *Knight*, 164 So.2d 547. Petitioner suggests that the facts of this case evidence a form of entrapment practiced on the petitioner by MEDALLION and IRS acting in concert.

It is sufficient to deny relief in equitable proceedings, if the complaining party has been guilty of unscrupulous practices or overreaching, or has concealed important facts, thought not actually fraudulent or has been guilty of trickery, or taking undue advantage of his position, or unconscientious conduct. *Dale* vs. *Jennings*, 107 So. 175.

MEDALLION, on the direction of IRS, by (a) leading the BANK to rely upon past practices, (b) submitting to the BANK a listing of 190 separate amounts representing wages of individual electricians, (c) advising the BANK that the BANK was once again called upon to prepare MEDALLION's payroll, and (d) depositing the HANNAN company check to the payroll account, committed both concealment and misrepresentation, knowing the same to be false, with the intention that the BANK be induced to rely upon such concealment and misrepresentation, and as a consequence of this, the BANK acting in reliance has been substantially injured.

Whether or not the conduct of the IRS has been "sufficiently malignant" to deprive the respondent of holder in due course status (which petitioner suggests is the case) the Court of Appeals erred in applying that standard in allowing equitable relief to respondent, whose actions were sufficiently unjust, unscrupulous, unfair and unconscientious, being based as they were on misrepresentation and concealment, so as to disturb the trial judge and cause the Court of Appeals to concede that certain evidence supported the BANK's defensive theories.

IV

THE COURT BELOW ERRED IN GIVING TOO BROAD AN INTERPRETATION OF SECTION 6311 OF THE 1954 INTERNAL REVENUE CODE, SO AS TO PROVIDE FOR A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK WHERE (a) PETITIONER BANK NEVER ACTUALLY RECEIVED THE FUNDS FOR WHICH THE MONEY ORDERS WERE ISSUED, (b) THE MONEY ORDERS WERE OBTAINED FROM PETITIONER BANK BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY AGENTS OF THE INTERNAL REVENUE SERVICE, AND (c) THE MONEY ORDERS WERE NOT DRAWN IN PAYMENT OF INTERNAL REVENUE TAXES, BUT INSTEAD WERE COMPLETED BY THE INTERNAL REVENUE SERVICE OTHERWISE THAN AS AUTHORIZED UNDER FLORIDA UNIFORM COMMERCIAL CODE SECTION 673.3-407.

As noted by the Court of Appeals, no reported decisions treat Section 6311 of the 1954 Internal Revenue Code. The wording of Section 6311(b)(2) does speak in terms of a "preference" given to the United States over "any other claims whatsoever against such bank or issuer, except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating note of such bank." These words reflect that the purpose of the statute was to enable the United States to maintain a preferential position as against general creditors under circumstances such as appeared in the case of *American Tobacco Co.* vs. *South Carolina National Bank*, 15 F.Supp. 215, where checks, certified by the defendant bank in that case and forwarded to the collector of Internal Revenue were not paid by reason of a bank holiday proclaimed by the President of the United States. That is, the statute governs the situation where a bank has actually obtained and retained funds against which

remittance was made, but where, as in a bank failure, a situation arises with multiple claims being made against the bank by creditors. In such a situation, the United States obtains a preference in payment. Except in such a situation, there would be no reason for the statute to talk in terms of "expenses of administration" and the "redemption of the circulating notes of such bank."

In the instant case the IRS ordered MEDALLION to procure the money orders from the BANK under false pretenses and then, by inserting the name "Internal Revenue Service" in the place for payee, IRS completed the money orders otherwise than as authorized so that under 673.3-407 Florida Statutes (App. 4a) there was a material alteration of the instrument, which should have discharged the BANK from liability for payment, since IRS was not a *subsequent* holder in due course.

Such material alteration when it became known to HANNAN resulted in the latter's stop payment order on the check deposited to MEDALLION's payroll account which in turn prevented the BANK's collection of the funds against which the money orders were issued.

Despite this, respondent seeks to use Section 6311 not as a device to maintain the preferential position of the United States as against general creditors under circumstances where the BANK has actually obtained and retained funds against which the remittance was made and drawn in payment of Internal Revenue taxes, but rather as a trap which the IRS, acting in concert with MEDALLION, has helped bait and having taken in the BANK, IRS now seeks to extract from the BANK monies which the BANK itself has never received.

This Court has granted a petition for writ of certiorari to review a too narrow interpretation of an income tax statute given by the Tax Court and a Court of Appeals, *Commissioner of Internal Revenue* vs. *Lo Bue*, 351 U.S. 244. Such opportunity for review should like-

wise exist to review too broad an interpretation given to an income tax statute by a Court of Appeals.

The broad interpretation given to the statute by the Court of Appeals for the Fifth Circuit has enabled the IRS to profit at the expense of an innocent party as a consequence of a situation created by the IRS and to use the statute as a sword against such innocent party and not merely as a shield to protect the United States against the loss of a taxpayer's assets.

CONCLUSION

The questions presented by this case are of great and recurring significance, particularly as they relate to the administration of the income tax laws and the conduct of the Internal Revenue Service in such administration. For this reason and the reasons set forth above, it is respectively submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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